

4

2

BEFORE THE HIGH COURT OF CHHATTISGARH AT
BILASPUR [CHHATTISGARH]

Cr.A. No. 498 /2006

Single Bench

APPELLANT

(in Jail)

Filed on
by Shri

04/7/06

R to D.R. (J)

:

Lachhram @ Guddu S/o. Late
Vishram Bhunjiya aged about
22 years, R/o. Village Pali,
Police Chowki-Patera, P.S.
Tungaon, Distt. Mahasamund
(C.G.).

VERSUS

RESPONDENT

:

State of Chhattisgarh, through --
Police Station Tungaon;
District-Mahasamund [C.G.]

CRIMINAL APPEAL U/S 374(2) OF THE CRIMINAL
PROCEDURE CODE 1973.

D-COPY

BILASPUR

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	<u>21-08-2006</u> Appellant Lachhura @ Guddu by Shri Virendra Sharma, Advocate. State by Shri Ravindra Agrawal, Panel Lawyer. This appeal was finally heard today. The appellant is aggrieved by his conviction under Section-363, 366 & 376 of the IPC and sentence of rigorous imprisonment for 5 years and fine of Rs.250/- each and in default of payment of fine to undergo additional rigorous imprisonment for 1 month under Sections-363 & 366 of the IPC and rigorous imprisonment for 10 years and to a fine of Rs.500/- and in default of payment of fine to undergo additional rigorous imprisonment for 2 months under Section-376 of the IPC in Sessions Case No.25/2006 vide judgment dated 08-05-2006 delivered by the Ist Additional Sessions Judge, Mahasamund. It is alleged by the prosecution that on 20-10-2005 at about 4 P.M., the appellant kidnapped the prosecutrix aged 14 years from the lawful custody of her parents with the intention of subjecting her to sexual intercourse and thereafter took the prosecutrix to the brick clan, Kanekera and committed rape on her. A missing person report was lodged by Bisambhar PW-2 vide Ex.P-15 (C) on 22-10-2005. He found the prosecutrix at brick clan, Kanekera on 22-10-2005. F.I.R. was lodged by the prosecutrix PW-1 vide Ex.P-6 on 26-12-2005. The prosecutrix was examined by Dr. Smt. Alka Pardal PW-8 who did not find any marks of injury either on her person or on her private parts. Vagina of the prosecutrix admitted two fingers easily. Hymen had an old tear. It was opined that the prosecutrix was accustomed to sexual	

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

C.A. NO. 498/2006
मामला क्रमांक सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
6	intercourse. After conducting radiological examination for determination of age of the prosecutrix, Dr. Smt. Alka Pardal PW-8 estimated the age of the prosecutrix to be 16 years vide report Ex.P-5. The appellant was medically examined by Dr. A.K.Tripathi, PW-13 and was found to be capable of performing sexual intercourse. After completion of investigation, the appellant was prosecuted. The appellant abjured the guilt, pleaded innocence and false implication and led no evidence in defence. The prosecution examined as many as 13 witnesses. Relying upon the evidence led by the prosecution, the learned trial Judge held that on the date of occurrence the prosecutrix was aged 14 years and convicted and sentenced the appellant as aforesaid. Shri Virendra Sharma, learned counsel for the appellant, contended that primary evidence relating to proof of date of birth of the prosecutrix i.e. the evidence of Kotwar of the concerned village, though available with the prosecution was deliberately suppressed as was revealed in para-20 of the testimony of the Investigating Officer Head Constable Kapishwar Pushpkar PW-10. It was also urged that the testimony of the prosecutrix in para-3 & 4 leave no room for any doubt that the prosecutrix had gone with the appellant of her own freewill and both lived as husband and wife for a period about 2 months. It was also urged that the evidence of Bisambhar PW-2 & Chhanulal PW-4 relating to the age of the prosecutrix was highly contradictory and in view of the medical evidence of Dr. Smt. Alka Pardal PW-8 and the non-examination of the Kotwar the possibility that the prosecutrix was aged about 18 years or	-2-

मामला क्रमांक सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	more on the date of occurrence could not be ruled out. On these premises, it was urged that conviction of the appellant under Section-363, 366 & 376 of the IPC and the sentences awarded thereunder by the learned trial Judge was liable to be set aside. On the other hand, Shri Ravindra Agrawal, learned Panel Lawyer for the State argued in support of the impugned judgment while contending that not only in the missing person report Ex.P-15-C but also Bisambhar PW-2, father of the prosecutrix, Sonia Bai PW-3, mother of the prosecutrix and Chhanulal PW-4, brother of the prosecutrix had categorically stated that the prosecutrix was aged about 14 years which testimony stood wholly un rebutted in cross examination. On this premise, it was urged that consent of the prosecutrix was wholly immaterial since the prosecutrix was less than 16 years of age on the date of occurrence. Having considered rival submissions, I have perused the record of Sessions Case Number-25/2006 with utmost circumspection. The testimony of the prosecutrix in para-3 leaves no room for any doubt that she left with the appellant on her own freewill and lived with him at Brick clan, Kanekera like husband and wife and voluntarily submitted to sexual intercourse by the appellant. The testimony of Santosh Kumar PW-5 in para-2 and para-4 also shows that the appellant and the prosecutrix came to brick clan, Kanekera in search of a job. It also shows that he had permitted the appellant and the prosecutrix to live in the office room where they used to live together. It also transpires from the evidence led by the prosecution that till Bishambhar PW-2 found the prosecutrix living at the Brick clan at Kanekera with the appellant, the prosecutrix had	

मामला क्रमांक सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	never complained to anyone or objected to the sexual intercourse committed by the appellant. The prosecutrix in para-10 of her testimony stated that the appellant took her from Bagbahara to Bihajhar and thereafter to Kanekera and that they lived together at the brick clan and developed relationship like a married couple. It leaves no room for any doubt that the prosecutrix had voluntarily consented to the sexual intercourse committed by the appellant. So far as the age of the prosecutrix on the date of occurrence is concerned, no documentary evidence has been furnished by the prosecution. Chhannu lal PW-4 stated that the prosecutrix did not go to school. Bisambhar PW-2, Soniya Bai PW-3 and Chhannu lal PW-4 have stated the age of the prosecutrix to be 14 years only on the basis of being informed by the Kotwar. However, the Investigating Officer Kapishwar Pushpkar PW-10 has admitted in para-20 of his testimony that proof of date of birth of the prosecutrix was not seized from the Kotwar. Non examination of the Kotwar by the prosecution also justifies an adverse inference against the prosecution in this case since the primary evidence relating to date of birth of the prosecutrix was suppressed. In this manner, the only proof relating to the age of the prosecutrix is the testimony of Dr. Smt. Alka Pardal PW-8 that the age of the prosecutrix could be 16 years. However, a perusal of the radiological examination conducted by her vide Ex.P-8 shows a finding that ossification centre of crest of ileum was also in process of fusion which completes at the age of 17 to 19 years. In this view of the matter, in the absence of	

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

C.A. No. 498/2006

मामला क्रमांक सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	any legal, cogent and reliable evidence relating to proof of date of birth of the prosecutrix and also considering the legally permissible margin of error of two years on either side in the report of ossification, it could not be ruled out that age of the prosecutrix was 18 years on the date of occurrence. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the prosecutrix, perhaps aged 18 years left with the appellant of her own freewill and consented voluntarily to the sexual intercourse committed by the appellant. Under these circumstances, conviction of the appellant under Section-363, 366 & 376 of the IPC and the sentences awarded thereunder by the learned trial Judge are liable to be set aside. In the result, this appeal is allowed. Conviction of the appellant under Section-363, 366 & 376 of the IPC and the sentences awarded thereunder by the learned trial Judge are set aside. The appellant is acquitted and he shall be set at liberty forthwith if not required in any other case.	-5- Sd/- Dilip Raosaheb Deshmukh Judge

P.T.O.

24.8.06